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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-482

Victor L. Marchetti,

Petitioner,

v.

United States of America,

Respondent.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

This Amicus Curiae brief is submitted on behalf of the Association of American Publishers, Inc. (hereinafter referred to as "The Association")

in support of the petition of Victor L. Marchetti for writ of certiorari herein.

INTEREST OF THE ASSOCIATION

The Association is a trade association organized under the laws of New York and composed of publishers of general books, textbooks and educational materials. It is estimated that its more than 260 members, which include many university presses and religious book publishers, publish approximately 85% of all such books and materials produced in the United States.

The Association has joined in this petition because of the dangers to First Amendment rights inherent in the decision

of the U.S. Court of Appeals for Fourth Circuit. Although the Fourth Circuit decision makes reference to First Amendment considerations, by allowing the Central Intelligency Agency to prevent publication of certain materials without judicial review as to whether such publication would be in any way harmful, the Court below has emasculated both the First Amendment and the federal judiciary.

As modified by the Fourth Circuit, the relief granted the government compels the petitioner Victor L. Marchetti, a former CIA employee, to submit to the CIA all writings, even fiction, which "relate to or purport to relate to the CIA, intelligence or intelligence acti-

vities or intelligence sources or methods" before release to any other individual or corporation. Within thirty (30) days of such submission the CIA is authorized to withhold approval for publication of "information which is classified and which has not been placed in the public domain by prior disclosure". While any deletions made by the CIA within the thirty (30) day period are subject to judicial review, as defined and limited by the Fourth Circuit, that review is, even in that court's own view, virtually meaningless. Such review would consist solely of a determination of two specific questions: (1) whether or not the material in

question is marked "classified" and (2) whether or not it is in the public domain.

Over the objections of Circuit Judge Craven, the Fourth Circuit declined to allow review of the propriety or reasonableness of any such classification. By refusing to look behind the classification of any material, the Fourth Circuit has abrogated a fundamental role of the judiciary and has given the executive branch, through the CIA, unfettered discretion as to what material deserves the secrecy classification - so that in Judge Craven's words even "the frivolous and the absurd" may receive such classification.

This relief granted to the government is of grave concern to the Association and its members because of the inroads of the First Amendment rights of Marchetti, his publisher (Alfred A. Knopf, Inc. a member of the Association), and, above all, the public. Should the relief be allowed to stand, the government would be allowed effectively to impose prior restraints on the rights of free press and speech and, equally important, the judiciary would lose to some degree its role as an interpreter and protector of constitutional rights.

POINT I

The First Amendment Precludes Any Prior Restraint.

While in some respects this may be

a case of first impression, it cannot be reviewed or decided in a vacuum. The essence of the American freedoms of speech and press have been created, clarified and emphasized by years of judicial, not executive or legislative, decision making. A primary tenet of our First Amendment freedoms is well stated by Chief Justice Hughes in the now classic opinion in Near v. Minnesota, 283 U.S. 697, 716 (1931): "Liberty of the press, historically considered and taken up by the Federal Constitution has meant, principally although not exclusively, immunity from previous restraints or censorship."

Last year this proposition was restated for this Court by Chief Justice Burger in Organization for a Better

Austin v. Keefe, 402 U.S. 415, 419 (1971), where it was specifically noted that any person seeking such relief "carried a heavy burden of showing justification for the imposition of such a restraint." (emphasis supplied)

No assessment of the government's alleged need for secrecy can be made without balancing that alleged need with the right of Marchetti to speak and write and the right of the public to be informed. In weighing such conflicting needs, the courts have in the past rejected curbing First Amendment freedoms in the interest of national security. This was the essence of the recent Pentagon Papers case, New York Times v. United States, 403 U.S. 713 (1971) and other cases preceding it.

For example, in United States v. Robel, 389 U.S. 258, 263-264 (1967), the Supreme Court refused to sanction a congressional statute restricting First Amendment rights in the name of national defense: Chief Justice Warren stated:

> "However, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. Even the war power does not remove constitutional limitations safeguarding essential liberties... Yet, this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the

> name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile." (citations omitted)

Here, instead of "war power", the government has "invoked as a talismanic incantation", the label "classified". Unfortunately, the Fourth Circuit has not only sanctioned this use of invoking "classified" as a talismanic incantation, but it has effectively invited the creation of further unilaterally-imposed information barriers.

By its treatment of the government's claim in the Pentagon Papers case, this Court has recently rejected such unilateral decision making as to what should reasonably be classified. The role of the label "classified" in the context of

the Circuit Court's decision is no different from that of the label "security" in the opinion of Justice Black in the Pentagon Papers case:

> "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." 403 U.S. 713, 719 (1971).

The Association submits that the "heavy presumption" against prior restraint has not been met by the government in this case. More importantly, for the purposes of this petition, the Fourth Circuit's decision actually serves to convert the presumption against prior

restraint in this case to an irrebutable presumption that the government is entitled to any prior restraint it desires. Years of firmly-grounded precedent should not be so lightly thrown away.

POINT II

THE FIRST AMENDMENT REQUIRES JUDICIAL SCRUTINY OF THE REASONABLENESS OF THE CLASSIFICATION OF ANY DELETED MATERIAL.

Over the protest of Judge Craven, the Fourth Circuit opinion leaves the propriety of any classification of material immune from judicial review. Moreover, it then allows this unexamined classification to be the basis for a court order enjoining the publication of such material by Mr. Marchetti. On

at least three different occasions, this Court has refused to be bound by such an unreviewed administrative determination.

Last year in the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971), this Court specifically refused to leave such unfettered discretion to the government. The material involved in that case was classified by the government as Top Secret and Secret (see United States v. New York Times Co., 328 F.Supp. 324, 326 (S.D.N.Y. 1971) and self-evidently was not in the public domain. Despite this government classification, none of the nine justices of this Court would

have granted permanent injunctive relief against public dissemination of the subject material just because it was classified.

Three of the concurring justices would have disregarded entirely the classification of the material and prohibited any court restraint at least in the absence of specific congressional authorization. The three other concurring justices would have granted injunctive relief only upon demonstration by the government that absent such relief some direct, immediate and irreparable damage would result. These justices found that despite the classification of the material before them, the government

had not sustained the constitutionally-imposed burden of proof to prevent publication. Thus, Mr. Justice Brennan stated:

> "Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary." (Id. at 726-727)

Similarly, Mr. Justice Stewart, speaking also for Mr. Justice White, stated:

> "We are asked, quite simply to prevent the publication by two newspapers of material that the

> Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court." (Id. at 730)

Even the three dissenting justices, while contending that preliminary injunctive relief was necessary pending ultimate determination of the issues, all indicated that there should be a prompt trial of the issues raised. This can only mean court scrutiny of the precise question the Fourth Circuit held herein to be beyond judicial inves-

tigation - the propriety and reasonableness of the classification of the material in question.

Unquestionably, in the Pentagon Papers case, the material sought to be published was both classified and not in the public domain, thereby removing from that litigation the only questions the Fourth Circuit decision would leave for court determination. Thus all nine justices in the Pentagon Papers case were opposed to the result sanctioned by the court below, imposition of permanent prior restraint on free speech based upon an unexamined adminstrative classification.

As regards the question of judicial review, this case cannot be distinguished from the Pentagon Papers case because of the contracts signed by Mr. Marchetti or his status as a former government employee. This was recognized by the Fourth Circuit when it correctly held that neither a contract nor public employee status can act as a surrender of First Amendment rights.

> "We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship."

See also Cole v. Richardson, 31 L.Ed. 2d 593 (1972); Pickering v. Board of

Education, 391 U.S. 563 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). While there may be a valid contract, it cannot be enforced in derogation of the First Amendment. Only a judicial determination of the perameter of First Amendment protections can be balanced against the contractual obligations here, no less than such a judicial determination was weighed against national security claims of the government in the Pentagon Papers.

The decision of the Fourth Circuit also conflicts with this Court's opinion in United States v. Reynolds 345 U.S. 1 (1953). In that case, the government claimed it was

privileged to withhold certain classified records concerning the crash of an Air Force plane carrying secret electronic gear in a Federal Tort Claims Act litigation arising out of that crash. While recognizing that in some instances the government's claim of privilege based on official secrets would be honored, this Court emphasized that the determination of what secrets are to be so protected must be made by the Courts and not by the Executive Department. As Chief Justice Vinson stated at page 9-10;

> "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

Here, the Fourth Circuit has abdicated to the caprice of executive officers, the question of when prior restraints on freedom of speech may be imposed.

Such a result is also against the mandate of this Court in Freedman v. Maryland, 380 U.S. 51 (1965). The Fourth Circuit gave lip service to that decision by imposing some of the necessary procedural safeguards missing from the order of the District Court, such as granting the right to judicial review and requiring that the CIA's action be subject to time limits. But, as the majority opinion below itself recognized the effect of these safeguards is vitiated by its refusal to allow the

judiciary to go behind the classification of the material involved.

> "Indeed, in most instances, there ought to be no practical reason for judicial review since, because of its limited nature, there would be only narrow areas for possible disagreement."

As made clear by the opinion, these areas are narrow indeed. The only reviewable questions are (1) is the material classified? and (2) is the material in the public domain? This unsatisfactory limiting of judicial review ignors one of the fundamental premises of Freedman:

> "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court-part of an independent branch of government - to the constitutionally protected interests in free expression." (at 57-58)

Here, that same danger is compounded by the fact that the reviewing authorities in the CIA would also be subject to the natural human tendency not to expose their agency and perhaps their own personal actions to public scrutiny and possible public embarrassment and denunciation. The Fourth Circuit, while recognizing the need for judicial review, removed from its scope the one meaningful question, the propriety of the government's classification upon which it would obtain court censorship.

The Fourth Circuit based its abdication on the difficulty of the issues. The language used is so broad that it

virtually invites issuance of court ordered prior restraints by executive branch determination alone:

> "Its [The CIA's] operations, generally, are an executive function beyond the control of the judicial power."
>
> "The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area."

Such difficulty has not stopped courts from fulfilling their role in determining a myriad of complex questions in other "expert" areas. For example: the adequacy of a description of complex financial transactions, the mental condition of an accused criminal defendant, the causes of an airplane crash,

the infringement of a patent for a complex technological process or a copyright for a musical composition, or the effect of a certain business policy of one company upon competition in a particular industry involve equally complex issues. The whole basis of the American adversarial system of justice is the belief that courts, with the assistance of opposing counsel, are best able to resolve these issues. Here,the courts with their sensitivity not only to the needs of national security, but also to the values inherent in the First Amendment, must make such determinations in order to protect such values from an overzealous censor. As Judge

Craven said the difficulty of this determination does not mean "it may never be attempted".

CONCLUSION

For all the reasons stated above, The Association respectfully submits that this Court should grant the petition for writ of certiorari and upon the hearing of such writ, reverse the order of the Courts below and dismiss this action as a matter of law. In the alternative this Court should remand this action to the District Court for adjudication of the propriety

of any proposed deletions in any manuscript written by Mr. Marchetti.

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